COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP331 **Cir. Ct. No. 1995CF607**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Michael S. Johnson has appealed from an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2003-

04).[1] He sought relief from a judgment entered in 1996, convicting him after a jury trial of two counts of attempted first-degree intentional homicide while armed with identity concealed, and two counts of attempted armed robbery with identity concealed. Johnson was convicted of all four offenses as a party to the crime. This court affirmed Johnson's judgment of conviction and an order denying postconviction relief in ***State v. Johnson***, No. 1997AP195-CR, unpublished slip op. (Wis. Ct. App. Nov. 12, 1997).

¶2 In the postconviction motion that gives rise to this appeal, Johnson alleged ineffective assistance by both his trial counsel and his appellate attorney in the prior appeal. He contended that his trial counsel rendered ineffective assistance when he pursued an all-or-nothing strategy on the attempted first-degree intentional homicide charges, and failed to request a lesser-included offense instruction on first-degree recklessly endangering safety by use of a dangerous weapon.

¶3 After a ***Machner***[2] hearing at which Johnson, his trial counsel, and his former appellate attorney testified, the trial court concluded that neither attorneys' performance was deficient. We affirm the trial court's order denying postconviction relief.

¶4 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient

[1] All references to the Wisconsin Statutes are to the 2003-04 version.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

performance, the defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his [or her] defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***Strickland***, 466 U.S. at 694.

¶5 Determining whether a defendant has been denied his or her constitutional right to the effective assistance of counsel presents a mixed question of law and fact. ***State v. Provo***, 2004 WI App 97, ¶6, 272 Wis. 2d 837, 681 N.W.2d 272, *review denied*, 2004 WI 123, 275 Wis. 2d 296, 687 N.W.2d 523. A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law, which this court decides without deference to the trial court. ***Id.***

¶6 Johnson's convictions arise from an incident that occurred on June 11, 1995, in the parking lot of a hardware store. Testimony indicated that Theron Holmes and Danielle Keppler were seated in Holmes' car when a black male approached the passenger side of the vehicle where Keppler was seated. The victims testified that the black male was holding a gun. The victims also testified that they observed a white male on the driver's side of the car where Holmes was seated.

¶7 Holmes testified that he backed up his car and put it into drive to drive away when the man holding the gun fired a shot, hitting the hood of Holmes' vehicle. Keppler confirmed that a shot was fired at the car. Just after Holmes' vehicle drove away, Sergeant William King entered the parking lot. Shots were fired at him from the direction of the suspects, who fled. King pursued and apprehended the black suspect, who was later identified as Johnson. King recovered a gun that had been discarded in the area, and a mask Johnson had allegedly worn during the attempted robbery. The white male, Aaron, was also apprehended near the scene.

¶8 Johnson was charged with attempted first-degree intentional homicide, party to the crime, based on the evidence that he shot at Holmes' car.[3] His defense at trial was that Aaron had the gun and committed the crimes by himself. Johnson admitted being present in the parking lot, but denied participating in the crimes, shooting the gun, or knowing that Aaron was going to commit a crime.

¶9 Prior to instructing the jury, the trial court asked counsel whether any additional instructions were being requested. Johnson's trial attorney, Douglas Henderson, stated that he wanted to make a record on the subject. He then stated that, in connection with the attempted first-degree intentional homicide charges, he had discussed with Johnson the possibility of requesting a lesser-included offense instruction on first-degree recklessly endangering safety. He stated that he had discussed the pros and cons of requesting it, and that Johnson's

[3] He was acquitted of first-degree recklessly endangering safety for allegedly shooting at King.

position was that he did not want Attorney Henderson to request the instruction. When the trial court inquired as to whether this was a matter of strategy, Attorney Henderson said "yes." The trial court then asked Johnson whether he had talked with Attorney Henderson about the possibility of a lesser-included offense instruction, and Johnson replied that he had, confirming that he thought it best for his position to refrain from requesting a lesser-included offense instruction.

¶10 In his postconviction motion and on appeal, Johnson contends that Attorney Henderson provided ineffective representation when he failed to request an instruction on first-degree recklessly endangering safety. He contends that such an instruction was necessary to give the jury a choice between convicting him of attempted first-degree intentional homicide and acquitting him completely.

¶11 Based upon the findings of fact made by the trial court at the ***Machner*** hearing, Johnson's appeal fails. At the hearing, Attorney Henderson testified that before the case was submitted to the jury, he advised Johnson to request a lesser-included offense instruction on first-degree recklessly endangering safety. Attorney Henderson testified that he believed it was a poor strategy to go to trial without the lesser-included instruction, but that Johnson did not want to request the instruction. Attorney Henderson testified that Johnson's position was that he did not commit the crimes and that he therefore acquiesced in Johnson's decision to forego the instruction. Attorney Henderson also testified that foregoing the lesser-included instruction was consistent with Johnson's defense that he was present at the scene of the crimes but did not participate in them. Attorney Henderson further testified that he brought the matter to the trial court's attention at trial because he disagreed with Johnson's decision.

¶12 At the conclusion of the ***Machner*** hearing, the trial court found that Attorney Henderson's testimony was credible. Based upon counsel's testimony and the record made at the time of trial, it found that Attorney Henderson discussed requesting the lesser-included offense instruction with Johnson, and made him aware of what his choices were. It found that Johnson rejected the option of requesting a lesser-included offense instruction. It found that the contrary testimony given by Johnson at the ***Machner*** hearing was incredible.

¶13 The reasonableness of counsel's actions may be determined or influenced by the defendant's own statements and actions. ***Strickland***, 466 U.S. at 691. A defendant who insists on making a decision which is his or hers alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the defendant's instructions. ***State v. Divanovic***, 200 Wis. 2d 210, 225, 546 N.W.2d 501 (Ct. App. 1996). Because the trial court found that Attorney Henderson discussed the option of requesting a lesser-included offense instruction with Johnson, and advised him to request the instruction, Attorney Henderson's performance cannot be deemed deficient.

¶14 Additionally, even if Attorney Henderson did not specifically discuss the possibility of the lesser-included offense instruction with Johnson, a defendant does not receive ineffective assistance when defense counsel has discussed with the client the general theory of defense, and when based on that theory trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense. *See* ***State v. Eckert***, 203 Wis. 2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996). The theory of Johnson's defense was that he was present in the parking lot at the time of the crimes, but that he did not know that Aaron intended to commit a

robbery and did not shoot the gun or otherwise participate in the crimes. According to Attorney Henderson's postconviction testimony, the defense was based upon Johnson's position that he did not commit the crimes.

¶15 Johnson testified at trial consistent with this defense, asserting that he was not carrying a gun at the time of the crimes, did not know his friend was going to try to rob the victims, and did not participate in the attempted robbery or shooting. Requesting a lesser-included offense instruction on the issue of whether Johnson endangered the safety of Holmes and Keppler by shooting at them would have been inconsistent with this defense and would have undermined Johnson's claim that he was merely an innocent bystander. Because Attorney Henderson's discussions with Johnson revealed that Johnson was committed to the defense that he was not the shooter and was not involved in any crime, and because the recklessly endangering instruction would have been inconsistent with this defense, Attorney Henderson cannot be deemed deficient for failing to request the instruction. *See* ***id.*** at 511.

¶16 In rejecting Johnson's claim that Attorney Henderson rendered ineffective assistance, we also note that when the evidence renders an all-or-nothing strategy viable, it is not unreasonable for an attorney to go for acquittal rather than risk conviction of a lesser-included offense. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶32, 246 Wis. 2d 648, 630 N.W.2d 752. Based upon the evidence in this case, an all-or-nothing strategy was objectively reasonable.[4]

[4] We recognize that Attorney Henderson testified that he believed that the all-or-nothing defense was a poor strategy. However, the pursuit of an all-or-nothing strategy may be reasonable and negate a claim of ineffective assistance even when trial counsel testifies that the failure to request a lesser-included instruction was not a strategic decision on his part. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752.

¶17 To convict Johnson as a party to the crime of attempted first-degree intentional homicide, the State was required to prove that Johnson intended to kill the victims, either by shooting them himself or by aiding and abetting Aaron. *See* WIS JI—CRIMINAL 401. The evidence at trial included Johnson's testimony that he did not shoot the gun or otherwise participate or intend to participate in the crimes. Moreover, even if the jury concluded that Johnson was the shooter, the evidence supported a finding that he had an opportunity to take a direct shot at the vehicle and its occupants as he stood by the passenger door but did not. Evidence indicated that he did not fire until the vehicle backed up and switched into drive to move forward. Although the shot hit the hood of the car, the jury could reasonably have found that Johnson did not intend to kill the victims when he took this shot, and that if he had intended to kill them, he would have shot earlier when he had a better opportunity to make a good shot.

¶18 In his closing argument, Attorney Henderson argued that Johnson was not a participant in the crimes or shooting, but that even if the jurors believed he was the shooter, the evidence did not support a finding that he intended to kill Holmes or Keppler. Based upon the evidence, the jury could have accepted either of these arguments, and found that Johnson did not shoot at the victims or, if he did, he did not intend to kill them. An all-or-nothing strategy was therefore objectively reasonable and pursuing it did not constitute ineffective assistance. The fact that the strategy failed does not render Attorney Henderson's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

¶19 Because Johnson has failed to establish that Attorney Henderson's performance was deficient, we need not address the prejudice prong of the ineffectiveness test. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶26. Johnson's claim that

his appellate counsel was ineffective for failing to argue ineffective assistance of trial counsel must also fail. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶20 Johnson's final argument is that he should be granted a new trial in the interests of justice pursuant to WIS. STAT. § 752.35. The basis for this argument is that, absent an instruction on the lesser-included offense of recklessly endangering safety, the matter was not fully tried. However, we have already concluded that the all-or-nothing strategy pursued at trial was objectively reasonable. Because the strategy was reasonable, a new trial will not be ordered under the guise of arguing that the matter was not fully tried.

By the Court.— Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.